No. 17-571

IN THE
Supreme Court of the United States

FOURTH ESTATE PUBLIC BENEFIT CORPORATION,
Petitioner,

v.

WALL-STREET.COM, LLC AND JERROLD D. BURDEN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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November 13, 2018

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Fourth Estate Public Benefit Corporation states that it is a public benefit corporation that has not issued any stock.

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Respondents and the government cannot counter textual evidence that the phrase "make registration" and its passive-voice counterparts in the Copyright Act – including in § 411(a) – denote the action of a copyright owner in submitting the application, deposit, and fee required by § 408 to "obtain registration." Accordingly, their primary argument – that the word "registration" in the first sentence of § 411(a) unambiguously requires an affirmative determination by the Copyright Office that a certificate of registration should or should not issue before a copyright owner can sue – is incorrect. On the contrary, respondents and the government, to avoid an absurd reading of § 412, eventually admit that the statute makes clear that registration is "made" *on its effective date* – but that is the date when the copyright owner complies with the requirements of § 408, not when the Register eventually grants registration. That reading is consistent with petitioner's position, not respondents'.

The remainder of § 411(a) – which preserves a copyright owner's right to sue when "registration has been refused" – does not support a different reading. The first sentence of § 411(a) requires the copyright owner to make registration before bringing an action, and the rest of the provision clarifies the consequences of the Copyright Office's refusal to register a claim. The fact that a copyright owner is expressly authorized to initiate suit after such a refusal – which the first sentence might leave in doubt – hardly supports the argument that a copyright owner may not initiate a suit after making registration in compliance with the statute when the Office has not yet acted. On the contrary, adopting respondents' construction would put the first and second sentences of § 411(a) into conflict – which petitioner's interpretation avoids.

The history of the provision supports the plain meaning of the text because respondents' interpretation recreates the very problem that the statute was designed to solve: namely, that, before any infringement action can be brought, a copyright owner might have to bring a mandamus action if the Register fails to act. That is inconsistent with the view – adopted by the First and Ninth Circuits before enactment of the 1976 Act and embodied in § 411(a) – that, once a copyright owner "place[s] the . . . application[] in the mail" and "ha[s] done everything required of it under the copyright law with respect to the deposit of copies and registration," it is entitled to bring suit. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1108-09 (9th Cir. 1970); *see White-Smith Music Publ'g Co. v. Goff*, 187 F. 247, 247 (1st Cir. 1911); *see also Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637, 645 (2d Cir. 1958) (Clark, C.J., dissenting) (noting that the Act "[q]uite obviously . . . puts the condition of complying with the law . . . upon the copyright owner before he sues"). By rejecting the majority opinion in *Vacheron*, the statute is likewise properly read to reject the view that the Register should be the gatekeeper of copyright enforcement.

Arguments about underlying policy should be largely beside the point because ordinary tools of statutory interpretation yield a clear answer; in any event, such arguments likewise favor reversal. Respondents' claim that petitioner takes issue with the registration requirement or the policies underlying it is pretense: whether or not the Copyright Office has the power to block infringement suits by failing to act, copyright owners must comply with the registration requirement before suing. Statutory

incentives for prompt registration reside elsewhere, including in § 412. And the claim that the statute embodies a policy of administrative finality or exhaustion is belied by the terms and structure of the statute – including § 410(d), which puts courts' determination on equal footing with the Register's. In the real world, as *amici* attest, action by the Register not only is usually long in coming, but generally does not address the disputed issues that a court will confront. When such cases occur, courts can obtain the Register's views. Such concerns offer no justification for shielding infringers during the Copyright Office's inevitable delays, depriving copyright owners of their intellectual property in the meantime.

ARGUMENT

I. "REGISTRATION" IS "MADE" FOR PURPOSES OF § 411(a) BY THE COPYRIGHT OWNER

A. The Statute Uses the Phrase "Make Registration" and Its Variants To Refer to Compliance with the Requirements of § 408(a)

That the Copyright Act of 1976 uses the construction "make registration" and its variants to denote action by the copyright owner (and not the Copyright Office) matters for two reasons. First, it disproves respondents' claim that the word "registration" by itself resolves this case. Second, because the statute consistently uses the phrase to refer to the copyright owner's compliance with the requirements of § 408, the interpretive principle that statutory phrases should be given consistent meaning favors petitioner's construction. Pet. Br. 21-29.

1. Respondents' argument that the word "registration," by itself, indicates that a suit can be brought only after the Register acts cannot be reconciled with

either § 411(c) or § 412. Section 411(c) (which was adopted as § 411(b), adjacent to § 411(a)) provides that certain infringement actions can be brought prior to registration if "the copyright owner . . . makes registration for the work" within three months. Section 412 bars statutory damages and attorney's fees for infringement of a published work prior to registration unless "registration is made" within three months.

The first provision makes express that registration is "made" once the *copyright owner* complies with his registration obligations; the second strongly implies it. Pet. Br. 22-24. Reading the statute in this straightforward way is fatal to respondents' theory that the word "registration" provides the answer to the question presented, and respondents thus urge the Court to disregard the language of § 411(c) as a mistake – "copyright owner" is the "subject" of the sentence, they argue, for "ease of drafting." Resp. Br. 34 n.12. But if there were a conflict between the subject and the predicate of the sentence, it would have been noticed – no one would accidentally make it a condition of suit that the "copyright owner . . . grant registration" because that is not something the copyright owner does.[1] And this Court will not find a "drafting error" unless that error is "obvious" and the result it produces is "necessarily absurd," *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989), which respondents have made no attempt to show.

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[1] It would be especially inappropriate to treat the language of § 411(c) as inadvertent because that language was first introduced in 1969, seven years before the passage of the Act. *See* S. 543, 91st Cong. (1969); *see also* S. 644, 92nd Cong. (1971).

Respondents also make the unpalatable claim that, under § 411(c), even if the copyright owner complies with the registration requirement within three months, the copyright owner may be unable to maintain its suit if the Register has not acted within three months. This view (which the government rejects, *see* U.S. Br. 28) is, according to respondents, "entirely logical" because it will "prevent powerful stakeholders . . . from abusing Section 411(c)." Resp. Br. 35. That argument is practically self-refuting – it would be extraordinary for Congress to impose a three-month deadline, enforced by loss of enforcement rights, while leaving compliance with the deadline out of the copyright owner's hands.

Moreover, respondents lose their nerve in addressing § 412. Like § 411(c), § 412(2) imposes a three-month deadline for "registration [to be] made," but in this case respondents argue that registration is (as § 410(d) makes clear) "made" on its "effective date"; and the "effective date" is "keyed to the copyright owner's actions, not the Register's." Resp. Br. 33. But respondents offer no reason why what is true for § 412 is not also true for § 411(a): registration is "made" on the effective date of registration – *i.e.*, "the day on which an application, deposit, and fee . . . have all been received in the Copyright Office." 17 U.S.C. § 410(d). That reasoning supports petitioner, not respondents.

The government's effort to address these provisions leads it to the same fatal concession. The government does not contest that § 411(c) indicates that it is the copyright owner who "makes registration"; nor does it contest that § 412 makes no sense if "registration is made" on the date of the Register's action. Instead, it argues that the three-month deadlines in those provisions are of no concern because, under

§ 410(d), "no matter when the Copyright Office acts, if registration is ultimately granted, its effective date 'is the day on which an application, deposit, and fee . . . have all been received in the Copyright Office.'" U.S. Br. 28 (quoting § 410(d)). And, it says, "[a]s long as the effective date of registration falls within the three-month windows defined by Sections 411(c) and 412, the requirements of those provisions are met." *Id.* Again, if that is true for § 411(c) and § 412, so too it is true for § 411(a): registration is made on the effective date of registration, when the copyright owner has complied with § 408.[2]

2. Respondents and the government likewise cast no doubt on the conclusion that the statute elsewhere uses the construction "make registration" to refer to the copyright owner's compliance with the registration requirement. For example, § 405(b) includes the phrase "registration . . . has been made under section 408" – indicating that the copyright owner makes registration by complying with that statutory provision. The government has no answer, failing to address this provision at all. Respondents chalk this up to another drafting error – registration is not made under § 408 after all, they insist, because the Register might reject an application. Resp. Br. 37. The statute does not use the phrase in a manner consistent with respondents' argument. This is true as well of § 408(c)(3), which provides that "a single

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[2] The statute uses the phrase in just this sense in § 410(c) as well, when it refers to a "certificate of a registration made before or within five years after first publication of the work." For this purpose, the registration must be "made" on its effective date – not on the date of the Register's action – to avoid making nonsense of the incentives for registration, which apply to the copyright owner, not the Register.

renewal registration may be made . . . upon the filing of a single application and fee" – which says in so many words that registration "may be made . . . upon the filing of the application and fee" and not upon any action by the Register. Neither respondents (at 36) nor the government (at 27) offer a response that makes sense of the text Congress adopted.

Nor can respondents reconcile their view with § 110 of the 1976 Act; the government does not even try. That provision states that "any *deposit and registration made* after [the Copyright Act's effective] date in response to a demand under" the Act's predecessor "shall be made in accordance with" the new Act – indicating that the copyright owner does both. 17 U.S.C. § 407 note; *cf. id.* § 411(a) (referring to registration "made in accordance with this title"). Respondents' only answer (at 38) is to rewrite the provision – asserting that the owner responds to the Register's "demand by initiating the registration process through its application," and "the Register completes that process by approving, *i.e.*, making, registration." That is not what the Act says. It instead indicates that, once the Register makes a demand, the copyright owner makes both the deposit and registration in response.

3. Furthermore, it is not true that the 1976 Act, as adopted, ever used the phrase "registration has been made" to denote Register's grant of an application. Respondents (at 31) and the government (at 28) rely on § 708(a), but that provision was altered in 1982 to add the language that respondents and the government cite, and it addresses fees, not the litigation-significance of registration – which petitioner pointed out (at 27-28) but the other side ignores. No one would seriously argue that the same language in

§ 411(a) meant one thing in 1978 and another thing in 1983; accordingly, § 708(a) provides no interpretive guidance. *See* Pet. Br. 27 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998)).

The government argues (at 29) that § 205(c) *could* be read to require that registration had already been granted, but it does not dispute that § 205(c) only protects a transferee who properly records a transfer (which it can do irrespective of whether a certificate of registration has issued[3]) if the statutory phrase "registration has been made" refers to the copyright owner's compliance with the registration requirement, not the Register's administrative determination.[4] That reading of § 205 is reinforced by § 406(a)(2), which imposes liability for infringement notwithstanding good-faith reliance on a purported transfer or license from a person erroneously named in a copyright notice when "a document executed by the person named in the notice and showing the ownership of the copyright had been recorded." This means of notice is an alternative to "registration . . . made in the name of the owner of copyright," § 406(a)(1), and thus indicates that the existence of a certificate of registration is not essential to proper recordation.

Section 406(a)(1) – which charges an infringer with notice of ownership of copyright if "registration . . .

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[3] "*Any* transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office." 17 U.S.C. § 205(a) (emphasis added).

[4] Respondents' claim (at 28) that it "would make no sense" to charge persons with notice of a properly recorded document is wrong – any person can check to see whether a transfer of a copyright has been recorded by searching "under the title . . . of the work." 17 U.S.C. § 205(c)(1).

had been made in the name of the owner of copyright" – does not point to any different reading of § 411(a). The government asserts (at 29-30) the statute's use of "had been made" rather than "has been made" implies that the reference is to the Register's action, but does not explain why. Instead, the provision refers to registration that "had been made" rather than "has been made" for reasons of syntax: it refers to an action (making registration) that must take place prior to the beginning of the "undertaking" giving rise to potential liability. And, contrary to respondents' assertion (at 29), it makes sense that a potential infringer may be charged with notice of ownership once the owner has complied with the registration requirement: § 412 creates a similar dramatic difference in the consequences of infringement, but everyone agrees that the copyright owner's remedies turn on the date of the copyright owner's compliance with the registration requirement, not the Register's action.[5]

Contrary to the government's assertion (at 20), the preregistration provision, § 408(f), does not suggest that "submission of the required materials is an action distinct from 'registration' itself." First of all, as with § 708(a), the preregistration provision was not part of the 1976 Act – it was adopted in 2005 – and it thus carries less weight in determining the meaning of § 411(a)'s original language.[6] Further,

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[5] There is also no reason why – in connection with either § 406(a) or § 412 – the Register could not permit concerned potential infringers to search pending registration applications.

[6] For what it is worth, the House Report accompanying the 2005 legislation uses the verb "register" to refer to the copyright owner's action, not just the Register's – that is, in the sense that

the government's argument puts too much weight on the subsection heading of § 408(f)(3), which reads "[a]pplication for registration," while the text of § 408(f)(3) refers not only to the application itself but also to the fee and the deposit – that is, the materials required for making registration. It is "not . . . unusual" that a statutory heading "fails to refer to all the matters which the framers of that section wrote into the text," *Brotherhood of R.R. Trainmen v. Baltimore & O.R.R. Co.*, 331 U.S. 519, 528 (1947), and § 408(f)(3)'s heading does not outweigh Congress's textual statements that "*the owner* . . . may obtain registration . . . by delivering" a deposit, application, and fee, § 408(a) (emphasis added), and that "registration may be *made* . . . *upon* the filing of a[n] . . . application and fee," § 408(c)(3) (emphasis added).[7]

4. Dictionary definitions (discussed at Resp. Br. 30-31) do not suggest any different understanding. The meaning of "registration" includes "an act . . . of registering," and to "register" can mean either "to make or [to] secure an official entry of in a register." *Webster's Third New International Dictionary* 1912 (2002) ("*Webster's Third*"); *see also Black's Law*

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respondents wrongly suggest is contrary to plain language. *See* H.R. Rep. No. 109-33, pt. 1, at 5 (2005) (explaining certain circumstances under which "*a copyright owner* of a preregistered work *can register his or her work* under current law") (emphases added).

[7] The government does not argue that there is any difference between what is required under § 408(f)(3) and under § 408(a) or § 408(c)(3), nor does its theory explain why Congress spelled out the elements of registration in § 408(f)(3) rather than simply referring to one of the other sections. There is no interpretive principle based on any counterfactual presumption that Congress avoids using more words when fewer words would do.

Dictionary 1449 (4th ed. 1951) ("*Black's*") (definitions of "registration" including "[r]ecording" or "enrollment");[8] Authors Guild Br. 12. To "make," moreover, can mean either "to execute in an appropriate manner," as with a will or deed; or to "carry out" or "perform" an action. *Webster's Third* 1363. Thus, the copyright owner's performance of the steps statutorily required to secure an official record of the copyright from the Register fits within the ordinary meaning of the phrase "make registration" – consistent with Congress's usage of the phrase in § 411(c) and § 412 and elsewhere; with this Court's usage in other cases about the Copyright Act, *see* Pet. Br. 22; and with other statutory usages identified by *amici*, *see* NMPA Br. 11-12 n.5 (citing 15 U.S.C. § 1173(a)(4); 45 U.S.C. § 362(i)).

B. Allowing a Copyright Owner To Sue for Infringement Once the Copyright Owner Has Complied with the Registration Requirement Comports with the Structure of § 411(a) and the Rest of the Copyright Act

The understanding that § 411(a) authorizes actions for infringement once a copyright owner has registered the work further comports with the structure of rights and remedies established by the Copyright Act. Respondents and the government offer no explanation for why, under their reading, § 410(d) would make the effective date of registration the date

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[8] The contemporaneous edition of *Black's* further defined (at 1449) a "registrant" as "one who registers anything (*e.g.*, a trade-mark) for the purpose of securing a right or privilege granted by law on condition of such registration" – further showing that legal usage then included an owner of intellectual property as performing the act of registering that property.

on which the copyright owner complies with the requirements of § 408, yet § 411(a) would bar suits for infringement – including suits for injunctive relief to put a stop to ongoing infringement – after that effective date. They do not explain why the same provision clarifies that the same effective date applies if a court, rather than the Register, determines that the copyright owner complied with the registration requirement. *See* NMPA Br. 8. They offer no justification for rendering a copyright effectively valueless during any period of administrative delay by the Copyright Office, when the statute provides that the right to exclude exists by virtue of fixation, not compliance with any statutory formalities. 17 U.S.C. § 102(a). And they fail to confront the point – persuasively argued by *amici* – that *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30 (1939), establishes a presumption against a doubtful construction that deprives a copyright owner of its exclusive rights. *See* NMPA Br. 15-17. Nor do respondents offer any structural evidence to contradict the conclusion that the words of the statute require.

1. There is no force to the argument (Resp. Br. 20) that, because § 411(a) provides that a copyright owner *can* initiate suit after the Register has refused registration, it should be inferred that it *cannot* initiate suit if the Register has not acted. Courts applying the registration and deposit requirement of the 1909 Act divided on the question of what should happen where the Copyright Office refuses registration notwithstanding the copyright owner's compliance with the requirements of the statute. The second sentence of § 411(a) gives the answer by providing that, in any case where the copyright owner has made registration (that is, has delivered the required

application, deposit, and fee to the Copyright Office) but registration has been refused, the copyright owner may sue.

That had to be made explicit because, where the Register has refused registration, whether the copyright owner has acted "in accordance with" the statute is in doubt – the Register has found that it has not. But that does not prevent a suit from proceeding, in which, as § 410(d) provides, "a court of competent jurisdiction" ultimately determines whether the owner's submission was "acceptable for registration." Thus, the second sentence of § 411(a) is not an exception to the categorical registration requirement in the first sentence – it simply imposes an additional procedural requirement and clarifies that the Register is entitled to intervene. That is a better reading of the word "however," which does not, in ordinary language, signal contradiction. Pet. Br. 30.

The word "institute" in the second sentence of § 411(a) does not imply, as respondents suggest (at 23 n.6), that the Register's action must always come before a lawsuit begins. Rather, it mirrors the phrasing of the first sentence, which states that "no civil action for infringement . . . shall be instituted until . . . registration . . . has been made." Usually (almost always), registration is granted and the second sentence will not come into play. The second sentence addresses the unusual case where registration has been refused before the copyright owner institutes an action. That does not speak to what should happen when registration is refused *after* the suit is initiated, but § 410(d) clarifies that, in such a case, the court may find compliance with the registration requirement. Neither part of § 411(a) is offended where a copyright owner complies with the registration

requirement before instituting an action and the Register or a court later concludes that compliance was acceptable: either way, the copyright's effective date of registration comes before the action's date of institution. Respondents argue that Congress used the word "institute" to rule out the possibility of "maintaining" a suit already initiated. But there is no reason to draw that inference when the purpose of the second sentence is to describe and provide special procedures for a subclass of cases where suit *can* be instituted. *See also* Pet. Br. 31 n.21 (House Report: "a rejected claimant who has properly applied for registration may maintain an infringement suit" if notice is served).

The government argues (at 16) that Congress could have made the proper result clearer by redrafting the provision. But "the mere possibility of clearer phrasing cannot defeat the most natural reading of a statute," *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 416 (2012), especially where, as here, the possibility of clearer phrasing cuts both ways. The statute could have said: "no civil action for infringement of the copyright in any United States work shall be instituted until the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form." But the statute could also have said: "no civil action for infringement of the copyright in any United States work shall be instituted until the Register grants or refuses registration." These hypothetical alternatives do not clarify the meaning of "registration . . . has been made" in § 411(a).

2. Petitioner's reading does not render any provision of the Copyright Act superfluous. *Cf.* Resp. Br. 25-27; U.S. Br. 21-22.

First, the Act's preregistration regime in § 408(f) is not superfluous because it confers remedies unavailable under anyone's reading of § 411(a). Preregistration is available for a work that "is being prepared for commercial distribution" but that is as yet unfinished, § 408(f)(1), let alone unpublished. Under Copyright Office regulations, no deposit of the work (which may not yet exist) is required; instead, the copyright owner may make preregistration by submitting a description of the work. *See* 37 C.F.R. § 202.16(c)(6). As a result, the copyright owner can obtain an injunction against threatened infringement before the work is released for commercial distribution, when deposit may be difficult or impossible. *See* § 408(b)(2) (requiring, in the case of a published work, deposit of "two complete copies or phonorecords of the best edition"). Moreover, even if a record label registers a newly released song immediately and seeks expedited treatment (which the Register may not grant), unlawful copying and distribution over the Internet may have destroyed the commercial value of the song before the copyright owner can bring any action. *See* Copyright Alliance Br. 11 ("Millions of infringing copies or performances of a work can take place in days, or even minutes."). Preregistration helps avoid such results.

Second, § 410(d) is not superfluous because it clarifies that the effective date of registration is the date on which the underlying materials were properly submitted to the Register – whether the propriety of that submission is determined by the Register or, later, by a court. As no one disputes that the term "registration" *can* be read to refer to the action of the Register, eliminating potential disputes about the date serves an obvious purpose. In short, under

§ 410(d), the effective date of registration is the date that the copyright owner makes registration, not the date that the Register registers the claim. As noted above, that supports petitioner's reading of the statute, not respondents'.

Third, § 411(b) is not superfluous because it clarifies the evidentiary consequences of a certificate of registration: absent what amounts to a fraudulent application, the certificate proves that registration has been made (and entitles the owner to certain litigation advantages). The fact that, for purposes of § 411(a), "registration" is "made" by the owner's submission of the required materials does not imply anything about the evidentiary significance of a certificate.

II. THE ACT'S HISTORY CONFIRMS THAT A COPYRIGHT OWNER MAY INSTITUTE AN ACTION FOR INFRINGEMENT AFTER COMPLYING WITH STATUTORY REQUIREMENTS FOR REGISTRATION

The split of authority concerning the need for action by the Register before an infringement suit could proceed under the 1909 Act – and the statute's rejection of the view that such action was required – provides a further reason to reverse the decision under review. *See* Pet. Br. 32-36; *American Broad. Co. v. Aereo, Inc.*, 134 S. Ct. 2498, 2505-06 (2014). Respondents (at 40) and the government (at 25-26) argue that their proposed interpretation of the statute sufficiently solves the problem the majority in *Vacheron* created by eliminating the requirement for a copyright owner to seek mandamus to obtain review of the Register's refusal to register a claim. Their arguments fall short in two respects.

First, § 411(a) is inconsistent with the *rationale* of Judge Hand's opinion in *Vacheron* and consistent with the rationale of other circuits and the dissent of Judge Clark in *Vacheron*. Aside from a discussion of conflicting and inconclusive precedent, the opinion found "confirmation" for its view that the infringement action could not proceed absent affirmative action by the Register in "the text of the last sentence of § 13" of the 1909 Act, which "denies the right to sue for infringement 'until the provisions of this title with respect to *the deposit of copies and registration* of such work shall have been complied with.'" 260 F.2d at 640 (emphasis added). The court reasoned that, because this provision required "more than the mere 'deposit of copies,'" and because "the owner must submit an application and pay the required fees in order to make a deposit, we can think of no other added condition for 'registration' but acceptance by the Register." *Id.* at 640-41 (citation omitted). As the majority acknowledged (*id.* at 639), this is not how the First Circuit read the statute in *White-Smith Music Publishing*; the Ninth Circuit also rejected the reading in *Roth*.

Judge Clark was likewise unpersuaded: he noted that, where a "plaintiff has complied with the requirements put upon it," it should not be required to "assume the risk of waiting – perhaps until its right is lost by limitation or otherwise – until the Register has performed his statutory duties." *Vacheron*, 260 F.2d at 645 (Clark, C.J., dissenting) (footnote omitted). "So to conclude is to read this serious prohibition into the single word 'registration,' thus giving it a meaning which not merely is not required, but is actually belied by both the immediate context and the general statutory scheme of copy-

right." *Id.* The 1976 Act adopts Judge Clark's view: it omits the distinct requirement of compliance with the deposit requirement that had led Judge Hand to a different result. Pet. Br. 34. Respondents cannot account for this change in wording.

Second, respondents cannot dispute that their reading leaves unaddressed the very problem that Judge Clark highlighted in his dissent and that § 411(a), properly read, addresses. By requiring an affirmative action by the Register before a suit is permitted to proceed, the majority rule in *Vacheron* forced the copyright owner to "assume the risk of waiting" for the Register to act. 260 F.2d at 645 (Clark, C.J., dissenting). Commentary on the proposed revision deplored in particular the potential need for a copyright owner to bring mandamus before it could bring a civil action for infringement. *See* Pet. Br. 35. Under respondents' view, if the Copyright Office delays acting for months or years, neither registering a claim nor refusing registration – as it did here until the case was ripe for this Court's review – the copyright owner's sole remedy is, as the *Vacheron* majority held, to file for mandamus. Statutes should not be read to perpetuate the problem they were adopted to solve. *See Aereo*, 134 S. Ct. at 2505-06.

Committee reports and other commentary surrounding the adoption of the 1976 Act provide no support for respondents' view. The House Report accompanying the 1976 Act (to which respondents repeatedly refer) does not speak to the specific question presented; any clues it provides to the meaning of the statute point in petitioner's direction. *See* Pet. Br. 23 n.17, 31 n.21. The same is true of the Copyright Office's 1961 Report, which expressed the Office's

view that an "application for registration" is what is required before a copyright owner can file suit. *See id.* at 23 n.17, 35. Respondents (but not the government) cite (at 24) reports accompanying the Berne Convention Implementation Act of 1988 to suggest that a determination by the Register is a prerequisite to suit, but "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). Respondents' reliance on such statements underscores their lack of friends in the crowd of legislative materials pertinent to the 1976 Act.

III. THE COPYRIGHT ACT'S SCHEME OF RIGHTS AND REMEDIES FAVORS ALLOWING SUITS TO PROCEED ONCE THE COYPRIGHT OWNER HAS COMPLIED WITH REQUIRED FORMALITIES

Respondents do not deny that the Act grants copyright owners exclusive rights without requiring action by any agency. *See* 17 U.S.C. § 102(a). Nor do they deny what this Court made clear long before the Act was adopted: in the absence of any possible enforcement action, a copyright provides hardly any protection at all. *See Washingtonian Publ'g*, 306 U.S. at 40 ("Without right of vindication a copyright is valueless."). Yet they also do not deny that, in some cases, their reading will bar copyright owners from seeking meaningful relief for infringement. *See Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 620 (9th Cir. 2010). Respondents' effort to make that result seem less jarring is unavailing.

First, there is no merit to the claim that such disadvantages are an inevitable result of any registration requirement or are necessary to encourage early

registration. On the contrary, this case has nothing to do with whether the registration requirement is good policy, because there is no dispute that a copyright owner must register its work before suing. *See* Copyright Alliance Br. 21 (purpose of the registration rule "is fully vindicated" under petitioner's reading). Nor does it make sense to misread § 411(a) to create an incentive for early registration: § 412 already creates ample incentives for prompt registration of any published work by depriving copyright owners of statutory damages and attorney's fees if they fail to make registration within three months of publication. It would be odd for Congress to preserve these remedies for any copyright owner who makes registration within three months while depriving the same copyright owner of the ability to bring an action for an injunction to stop infringing conduct that begins before the Register acts. The statute does not direct that result.

Second, claims that requiring administrative finality will reduce the burdens of meritless copyright infringement suits give the registration process an importance in the copyright regime that is neither warranted by the statute nor consistent with actual administrative practice.[9] As explained above and in petitioner's opening brief, the determination of the Copyright Office is ultimately of limited importance to a court's determination of the scope of an author's right to exclude under the Copyright Act;

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[9] Neither respondents nor their *amici* cite any case in which the registration requirement forestalled meritless litigation; because registration is generally granted if formalities are satisfied, their reading of the requirement will not deter determined litigants. It can, however, protect willful infringers when registration is delayed. *See* ITA Br. 19.

any question of copyright eligibility – as well as any other question concerning registrability of a claim – must be determined *de novo* by a court. The views of the Copyright Office are frequently afforded little, if any, deference. *See Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411, 414 (2d Cir. 1985) (district court "in as good a position as the Copyright Office to decide" question of copyrightability); ABA Br. 22 n.17 (citing cases). The idea that the Copyright Office should be permitted to determine which authors should and which authors should not be afforded a timely remedy – with such determinations depending on the vagaries of internal operations – invites injustice and threatens loss of substantial rights based on the luck of the draw.[10]

Furthermore, as those whose livelihood depends on protection of intellectual property attest, the Copyright Office process does not and was never intended to "weed out" claims on the merits. *See* ABA Br. 19-21. As the Associate Register of Copyrights recently acknowledged, "[a]s a practical matter, I really don't want deference or an evidentiary presumption to be afforded" based on the determinations of the Copyright Office. Robert Kasunic, *Copyright from Inside the Box: A View from the U.S. Copyright Office*, 39 Colum. J.L. & Arts 311, 322 (2016). The Office grants 97% of applications; those not granted often languish over questions of how to categorize works that are unquestionably copyrightable (as occurred in this case). *See* NMPA Br. 21-22 (describing delays of

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[10] Respondents' reading creates a further paradox in that courts have held that an accused infringer may bring a declaratory-judgment action even though the copyright owner is not permitted to sue. *See* Copyright Alliance Br. 17-18.

more than three years without any administrative determination). The Copyright Office admittedly makes no meaningful review of a work's originality, and its decision to grant registration will only rarely purport to clarify the scope of any rights in a copyrightable work. Prior administrative review therefore will rarely be relevant to the question whether the defendant has invaded the copyright owner's exclusive rights.

In any such case, moreover, the Register will have the opportunity to make its views known. Under § 508(a), the Copyright Office must be promptly informed of the pendency of any infringement suit. And if a defendant raises a substantial issue of registrability implicating the Copyright Office's expertise, the courts can use the ordinary tools of litigation management to ensure that the Register can weigh in first. Pet. Br. 40-41. Accordingly, to the extent a benefit of the registration requirement is that it permits courts to take advantage of the Copyright Office's expertise, that benefit is preserved in every case, not just those filed after the Copyright Office has made its determination.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 13, 2018